

THE HONORABLE BENJAMIN H. SETTLE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

Plaintiff, ) **CASE NO. 3:06-cv-05367-BHS**  
v. )  
KETT TOOL COMPANY INC., et al. )  
Defendants. )  
 ) **DEFENDANT KETT TOOL**  
 ) **COMPANY INC.'S MOTION TO**  
 ) **EXCLUDE THE ADDENDUM TO THE**  
 ) **REPORT OF LORRAINE BARRICK**  
 ) **AND ANY RELATED TESTIMONY BY**  
 ) **HER THERETO**  
 )  
 ) **NOTED ON MOTION CALENDAR:**  
 ) **September 16, 2011**

## I. INTRODUCTION

Without leave of this Court or even a stipulation from the parties, and after the defendants submitted their rebuttal report to plaintiff PacTool International Ltd.’s (“PacTool”) proffered report on damages, PacTool unilaterally and astoundingly submits an “addendum” to its original report! Such a practice simply cannot be countenanced by this Court and as such defendant Kett Tool Company Inc. (“Kett”) respectfully moves this Court to exclude the “Addendum to Report of Lorraine Barrick” dated August 18, 2011 and any related testimony by her thereto.

## II. BACKGROUND

On June 15, 2011, this Court ordered that the deadline for Opening Expert Reports

1 was July 8, 2011, and the deadline for Rebuttal Reports was August 9, 2011. Dkt. 226.

2 On July 9, 2011, PacTool emailed a copy of the original report of Lorraine Barrick  
3 and also sent, for delivery on July 11, 2011, a hard copy of that report along with a disk  
4 containing documents referenced in that report.

5 On August 4, 2011, PacTool moved to exclude, in its entirety, the Expert Report and  
6 Related Testimony of Dr. Albert H. Lyter III. Dkt. 229.

7 On August 9, 2011, in response to the original report of Lorraine Barrick and in  
8 accordance with this Court's Order (Dkt. 226), Kett served the Rebuttal Expert Report of  
9 Keith A. Hock on PacTool.

10 On August 17, 2011, PacTool sent an "Addendum to Report of Lorraine Barrick,"  
11 which was dated August 18, 2011, to defendants, stating:

12 Mr. Hock's report reminded our expert that she  
13 inadvertently left out her description of marketing capacity.  
14 Here is a brief addendum.

15 (Ahrens Decl. Ex. A, filed herewith).

### 16 **III. ARGUMENT**

17 As is clear from the chronology, Ms. Barrick's "Addendum" was woefully and  
18 unexplainably late. Her addendum was submitted more than a month after her opening  
19 report was due and more than a week after PacTool received defendants' rebuttal to that  
20 report. This Court set forth a simple expert report schedule consisting only of Opening and  
21 Rebuttal Reports and no other replies, rebuttals, or addendums. For this reason alone, it must  
22 be excluded.

23 Moreover, PacTool provides no justification for the extreme tardiness of this  
24 addendum. In fact, the proffered reason is almost laughable, namely, that upon reading her  
25 opposing expert's rebuttal report, she was reminded "that she inadvertently left out her  
26 description of marketing capacity." (Ahrens Decl. Ex. A). Really? Which attorney, which

1 expert, which declarant could not, would not, like to say the same thing: "Upon reading or  
 2 hearing what my opponent has to say to my opening position, I now would like to expand  
 3 upon my original statement." Of course if the process is setup to allow for replies, that is one  
 4 thing, but that was not the process here.

5 Additionally, it is also obvious from the chronology as well as the proffered  
 6 explanation, that this addendum came after the rebuttal to her report was submitted. In other  
 7 words, Mr. Hock has never had the opportunity to respond to her now expanded report.

8 Finally, the timing of PacTool's related actions does cause one to raise an eyebrow.  
 9 For PacTool submits this untimely, unilateral addendum to correct an admitted deficiency in  
 10 its damages expert's report just two weeks *after* it moved this Court to exclude, in its  
 11 entirety, the Expert Report and Related Testimony of Dr. Albert H. Lyter III regarding  
 12 forensics for allegedly also being "incomplete." Dkt. 229. So on the one hand, PacTool  
 13 seeks to strike and exclude one allegedly incomplete report, a report interestingly that its own  
 14 expert found complete enough to render a rebuttal report to, but yet feels totally free to  
 15 unilaterally and without leave or stipulation, to expand its damages expert's report *after*  
 16 *service of* and *because of* the responsive rebuttal report. Incredulous.

17 **IV. CONCLUSION**

18 In sum, the "Addendum to Report of Lorraine Barrick" dated August 18, 2011, and  
 19 any testimony by her in regards thereto should be excluded. In the alternative, if this Court  
 20 were to allow the addendum (which for consistency sake would warrant a denial of  
 21 PacTool's motion to exclude as well, Dkt. 229), Mr. Hock should be allowed an opportunity  
 22 to respond to her expanded report.

23

24

25

26

1  
2  
3  
4  
5 Respectfully Submitted,

6 KETT TOOL COMPANY, INC.

7 /s/ John Paul Davis

8 Gregory F. Ahrens, OH Bar No. 0038627  
9 Admitted *Pro Hac Vice*  
10 John Paul Davis, OH Bar No. 0073446  
11 Admitted *Pro Hac Vice*  
12 WOOD, HERRON & EVANS, L.L.P.  
13 2700 Carew Tower  
14 441 Vine Street  
15 Cincinnati, Ohio 45202-2917  
16 (513) 241-2324  
17 Facsimile: (513) 241-6234  
18 jdavis@whepatent.com  
19 gahrens@whepatent.com

20 Paul Richard Brown, WSBA No. 19357  
21 Karr Tuttle Campbell  
22 1201 Third Avenue, Suite 2900  
23 Seattle, WA 98101  
24 (206) 224-8073  
25 pbrown@karrtuttle.com

26 Attorneys for Defendant  
Kett Tool Company Inc.

## **CERTIFICATE OF SERVICE**

I hereby certify that on September 1, 2011, the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system and thereby served on all counsel of record via ECF-generated e-mail and notification.

/s/ John Paul Davis  
John Paul Davis, OH Bar No. 0073446  
Admitted *Pro Hac Vice*